Urban Space as a Commons

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INTRODUCTION

Cities are quintessentially human and collective products. Not only the public space is functional to human flourishing. The entire urban space is the product of social cooperation. Therefore it has to be conceived as a commons.

Different philosophical and sociological images of the city – rectius metropolis – ranging from the envision of the metropolis as the major site of production of value[1] to the identification of the metropolis with the biopolitical dispositive *par excellence*[2]– support and enrich our understanding of the urban space as a commons.

In fact urban space is both the site of social conflicts concerning the appropriation of social value, i.e. value produced collectively by the social cooperation, and the realm of political transformation. Nowadays it identifies with the material substratum (or the frontier) of the global governance management of the crisis, after that speculative real estate investing in the cities has been at the core of financial capitalism explosion[3]. In this framework the notion of commons (or common goods in the continental version) - and the concept of the urban space as commons[4] - becomes a keyword within a strategy aiming at opposing the process of accumulation by dispossession[5] that affects the production/reproduction pattern within the metropolis.[6]

The identification of squares, streets, parks and public gardens with urban commons is generally uncontested,. There is a huge legal literature concerning these 'classic' urban commons. To my opinion, however, not only the 'public' space because functional to political participation and, ultimately, to human flourishing (think to the square, commonly depicted as the symbolic birthplace of public opinion), but the entire urban space as such has to be considered as produced, *possessed* and transformed in common. Therefore the urban space as a whole has to be qualified as a commons.

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[1] Antonio Negri, *La fabbrica e la metropoli*

[2] Giorgio Agamben, *La città e la metropoli*, in "Posse", 2007.

[3] David Harvey, *Rebel Cities.*

[4] For a strong advocacy of this idea see Sheila Foster and Christian Iaione, *The City as a Commons*, forthcoming.

[5] David Harvey, *The New Imperialism*, Oxford, Oxford University Press, 2003; Id., *Rebel Cities. From the Right to the Cities to the Urban Revolution,* London New York, Verso, 2012.

[6] Antonio Negri.

This assumption is obviously not neutral from a legal point of view. It raises the question as to whether private property of urban land is compatible with the understanding of urban space and its portions – neighborhoods for instance - as commons. At the very least a new understanding of urban property as a major factor in the construction of social relations is entailed, one that draws on the theory of property as a bundle of rights[7] and ultimately on the idea of a disintegrated property.[8]

In particular one question is to be dealt with: to what extent the understanding of the urban space as a commons and the idea of property as a bundle of rights, the elements of which can be disaggregated, impact on urban property? Let's consider common dynamics in urban contexts such as the 'illegal' occupation of land or buildings abandoned by their owners or subtracted from their cultural or otherwise collective destination for purposes of speculation. Or the dispossession of the cultural value (the 'ambiance') of a neighborhood and its pricing in the real estate market at the expenses of the original residents for the benefit of the new wealthier ones, a process universally known as gentrification. Is the notion of urban space as commons so functional as to limit or exclude the power of the owner to allot her property to a certain use, non-use or destination when that use or destination frustrates the fulfillment of others' fundamental rights? And, even more radically, can it affect the right of the owner - commonly assumed as a stick of the bundle - to transform spillovers coming from social cooperation into rent, in revenues for her own exclusive benefit?

To be sure the recognition and protection of the commons *en general* challenge the legal regime of property in force and query about the possible limits that the law may impose on property rights. In fact the true core of the commons discourse as a *legal* discourse is the notion of property as a bundle of rights and the possibilities of unbundling the sticks that constitutes property as such. In other words, given the public/private dichotomy that rules the access to resources in Western - and especially civil law - legal systems, the possibility of conceiving the common goods as a category that exceeds both private and public property relies on a legal realist approach to the very structure of property. Nonetheless other crucial questions arise when we face the topic of the commons as a legal problem. We may also ask: *What* are we talking about when we talk about common goods? *Who* are the beneficiaries, i.e. the people entitled to use what common goods? And finally: What kind of *legal entitlements* can be associated with the 'right' to access and use of those beneficiaries?

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[7] Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913).

[8] Thomas C. Grey, *The Disintegration of Property, in Liberty, Property and the Law*, edited with introductions by Richard A. Epstein, 2000.

This paper is an attempt to better understand the role of urban property as a major factor in the construction of social relations. It focuses on some examples of urban commoning such as the Limited Equity Cooperatives as a vehicle for low income housing and the so-called virtuous occupations of cultural spaces in Italy to highlight some possible way-outs from the commodification of the urban space.

It proceeds in three parts. Part I offers a definition and a taxonomy of what can be reasonably conceived as commons at the present time. Part II sets the scene for an understanding of the urban commons issue as a matter of property law. In part III I map various legal arrangements that have concretely given a legitimacy or, more precisely, a legal form to collective use as a property right distinct from property ownership. In the conclusion I go back to the relation between the commons discourse and the idea of property as a bundle of rights.

I. COMMONS OR COMMON GOODS[9]. A DEFINITION AND A TAXONOMY

To begin with, we can attempt to sketch a definition.

Commons, according to a diffuse opinion, give rise to social systems consisting of three elements[10]:

i) common pool *resources* (such as water, land, forest, a pond, a park or a garden, etc.);

ii) a *community* that has access to and takes care of this resource. The community and the common good are in a circular relation with one another by virtue of which the community is identified by the resource managed in common and the latter is in turn identified through the community that manages it;

iii) the collective action of (creating, restoring, maintaining and) governing in common, which is also defined in the scholarship as *commoning*.

The resources considered sub *i*) are usually identified in a) natural resources such as lakes, forests, the air, etc. and in b) intangible things such as traditional knowledge,

[9] In this paper I use the expressions common goods, which is an English translation of the terms *biens communs* and *beni comuni* diffused respectively in French and Italian literature, and commons, typical of the Anglo-American literature, as interchangeable. To my knowledge differences among these expressions are rather related to different theories and scientific disciplines (such as economics or the law) that have speculated on this topic than to different languages and legal traditions.
[10] See E. Ostrom, *Governing the commons. The Evolution of Institutions for Collective Action*, Cambridge University Press, 1990.

genetic resources, information and knowledge (that ought to be) freely accessible on the internet, and so on.

In the Italian experience the commons (common goods) have mostly represented a battleground for economic and social transformation: the common goods movements - not differently from analogous social movements in other parts of the world – have been struggling against the new enclosures of common spaces and resources ranging from tap water to cultural spaces - such as theaters or cinemas - subtracted by public or private owners to the public access for the benefit of private profit[11]. Accordingly, in the Italian debate – which from those social movements has largely profited – the common goods do not have a predefined substance: not only environmental resources or the cultural heritage of a country are *biens communs*. Common goods can be anything. A private cinema or a public farm can *be(come)* common goods.

Such a notion therefore implies a *non-naturalistic* attitude which characterizes the Italian experience as a whole. On the one hand a non-naturalistic notion of common goods emerges from the social movements' practices which have shown that the *biens communs* come out of social struggles, such as the referendum campaign against the privatization of tap water in 2011[12], and are created through the practice of *commoning*, as the many occupations of cultural spaces have pointed out. On the other hand, the social movements' approach to the common goods matches with and is strengthened by the theoretical elaboration of a group of Italian legal scholars also known as the Rodotà Commission.

The Rodotà Commission (hereinafter RC), so named after its chair, professor Stefano Rodotà, an internationally renowned legal scholar, was appointed in 2007 by the national Minister of Justice to reform the third chapter of the Italian civil code devoted to goods that are owned by the State and other public bodies. The RC produced a draft, which, although it remained steadfastly ignored by the Parliament[13], introduced to us the innovative category of *beni comuni* (common goods) as a third category of goods progressing beyond the public/private divide.

Following the RC's proposal, we can define the common goods in legal terms as those goods, public- or private-owned, which are functional to the fulfillment of fundamental rights and to individual flourishing and need to be protected by the law also on behalf of future generations.

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[11] See Saki Bailey and Ugo Mattei *Social Movements as Constituent Power,* 20 Indiana Journal of Global Legal Studies 965 (2013).
[12] S. Mattei and Bailey at nt.5.
[13] It is actually in the agenda of the Commissione Giustizia in the Italian Senate, waiting for an examination.

The concept of common goods delivered by the RC deserves some preliminary remarks. First of all both this definition and the one emerging from Italian social movements share a warning: the phrase 'Commons' or 'Common Goods' is *not* a new, fancy way of describing resources owned by the State, or by local governments such as municipalities. In fact common goods can be – and often are – owned by private actors. Both public and private property of common goods undergo legal restrictions in order to make collective access and use possible. Secondly and consequently, the RC's definition does not design a third type of property, different from both private property and public property. On the contrary, it requires the recognition of specific property rights of access and enjoyment to be disentangled from the bundle of rights and allocated to those whose fundamental rights are concerned. Thirdly, just like the notion that can be drawn from the social movements' practices, the legal notion developed by the RC implies a non-naturalistic vision of the commons. The qualification of a good as a common good comes in fact from its attitude to satisfy individuals' fundamental rights. The notion of fundamental rights which we refer to is drawn from the Italian democratic constitution but it also takes into account the supranational level, namely the European Charter of Fundamental Rights and Liberties, The European Convention of Human Rights, the common constitutional traditions of EU Member States, the Universal Declaration of Human Rights, and other international conventions. Therefore the spectrum of the fundamental rights relevant for the purpose of common goods qualification is very broad, ranging from the right to life and to health, to the right to a free and dignifying life (Art. 36 It. Const.) framed in the perspective of human flourishing and so including also the access to knowledge, to culture and to education, and the participation to the political, social and economic organization of the country (Art. 3 It. Const.).

Although the reform draft produced by the RC has not (or not yet)[14] come into force, the legal notion it has proposed has been deployed by the Italian Judicature at its highest degree, i.e. by the Plenary Session of the Supreme Court in 2011[15]. In asserting the public nature of the ownership of a Venice lagoon branch where a private entrepreneur had established her fish farming business, the Supreme Court affirmed the lagoon branch's legal status of common good drawing on the right to the environment as a fundamental right recognized to everyone by the Art. 9 of the Constitution.

Moving from the convergence between the non-naturalistic legal notion of common goods that I have been illustrating so far and the sociological notion of the commons as social systems consisting of three elements (resource, community and *commoning*), it is possible to taxonomize four different groups of common goods:

[14] The draft and the introductory memorandum are available at the web site http://www.giustizia.it/giustizia/it/mg_1_12_1.wp?contentId=SPS47617.

[15] Cassazione, Sezioni Unite Civili, 14.02.2011, n. 3665.

a) Natural resources, such as water, oceans, lakes, rivers, forests, the environment in a broader sense, etc.

b) Intangible resources as knowledge, cultural artifacts and works of art (to remain) in the public domain, indigenous traditions, human genes (with a mixed nature: tangible and intangible at the same time), the landscape (a resource of mixed nature as well), etc., all in harsh competition with intellectual property regimes.

c) The urban space. I have already clarified the reasons that ground an understanding of the urban space as a commons. To add some ingredients to this category in my taxonomy I will here exemplify some features that characterize the urban commons these days. A first trait is the tension between the neoliberal movement to 'enclose' the public space and a new tendency to urban commoning which goes across the urban space. Two major factors are strictly related to this feature: the release or transfer of public functions from local goverments to private groups[16] and the rhetoric of the community as redeeming from social decay as such. As a consequence we can identify another phenomenon which characterize social relations and conflicts within the urban space: the generation of new commons as outcome and as backlash of the private/public partnership and their changeable character, *conservative* under certain circumstances[17] and *transformative* under certain others.

d) In the fourth class I rank institutions providing public services such as public healthcare service, national or local systems of education, schools, universities and the like, and also infrastructures such as roads, railways, the internet, etc. The reason why I group these two types of resources in the same category is linked to the role they used to play in the Welfare State and to the transformation they undergo as a consequence of the crisis of the latter.

da) As to the first group, the common goods framework offers the theoretical tools to tackle the crisis of public services progressing beyond the usual neoliberal pattern of privatization as a consequence of the Public withdraw. As the Welfare State model declines it seems necessary to dismiss the *claim right v. state duty to provide the service* scheme, namely the vertical relationship between the state and the citizen and start thinking to public services as the products of social cooperation, hence to understand public services as commons. Accordingly PS recipients are requested to participate to the service management on the basis of horizontal relationships nurtured and expanded through new social bonds of cooperation and solidarity, so as to resist the neoliberal dynamics of public services commodification. In the words of the World Health

[16] See Sheila Foster, *Collective Action and the Urban Commons*, 87 Notre Dame L.R. 57 (2011).
[17] Sheila Foster, supra note 15.

Organization[18], just to make a significant example, health care is not a market commodity and it is rather to be deemed as a commons. Studies on the organization and management of health care as a commons are available[19]. They show that recipients participation to public healthcare management is such to improve the service performances. In other words commoning succeeds where privatization fails.

Other important studies regard education, and particularly universities[20]. Also universities can be revisited as (cultural) commons. They just present the commons' characteristic structure:

i) common pool *resources* (tangible goods such as buildings and facilities but also intangible goods: the knowledge that is produced);

ii) a *community* that has access to and takes care of these resources: students, faculty and staff;

iii) the collective action of governing in common. Universities are self-governed communities and possible distortions from the democratic model of self-government are better understood and identified if we think of universities as commons[21].

db) A field that partially overlaps with public services concerns infrastructures. Infrastructures are those resources that are functional to the production of other goods and utilities. Therefore they are not subjected to direct consumption but are means to produce and consume other resources.

Scholars distinguish between traditional infrastructures such as transportation and communications, and nontraditional infrastructures such as environmental (e.g. lakes) and intellectual (e.g. ideas, languages, etc.) infrastructures.

The functioning of infrastructures commonly facilitates a wide range of downstream productive activities and the creation of social goods. The dominant view in the

[18]See the report of the World Health Organization published in 2008, in http://www.who.int/whr/2008/en/

[19] Carlo Romagnoli, *La prevenzione ambientale e gli esposti. Indagine sul punto di vista di comitati territoriali per la salute e la qualità dell'ambiente sulle attività di prevenzione,* ISDE Umbria.

[20] Michael J. Madison, Brett M. Frischmann, and Katherine J. Strandburg, *The University As Constructed Cultural Commons*, 30 Wash. U. J. L. & Pol'y 365 (2009).

[21] A good practice of commoning within law faculties are legal clinics, a bottom-up teaching methodology according to which students learn by problem-solving meeting and interviewing real clients (usually socially marginalized people excluded from access to justice). By doing so a non-hierarchical process of legal knowledge production is implemented and more importantly this legal knowledge is shared with a broader community, outside the law faculty. S. M. R. Marella and Enrica Rigo, *Cliniche legali, Commons e giustizia sociale*, in Parolechiave, Carocci editore, 181-194 (2015).

evaluation of infrastructures performance efficiency embraces the standpoint of the supply-side that disregards the production of social goods as not identified as economic returns (profit) for the owner/provider of infrastructure. On this basis some users and uses are discriminated, some uses are prioritized at the expense of others, what generally affects the structuring of the infrastructure.

On the contrary, if we think to infrastructures from the point of view of the demand side as suggested in a recent study[22], we can take into account all (public and social) goods and utilities which are not returns for the infrastructure provider but produce positive externalities that benefit society as a whole. Now a nondiscriminatory access to and use of infrastructures enable (and enhance) the production of those public and social goods that improve people's wellbeing. Therefore open access and nondiscrimination are the keywords of an ideal regime of governing the infrastructures which relies neither on the market nor on the state direct intervention - through state management or subsidization - but on managing the infrastructures as commons. What gives substance to a project of open access and nondiscrimination between users' identities and the various uses they pursue is a mechanism of cross-subsidies between different uses, different users and the production of different goods[23]. In other words open access and nondiscrimination as focal principles of a management regime based on commoning are such as to produce redistributive effects between various possible users and uses in this way triggering a virtuous circle between spillovers some uses are able to produce and the social demand for access and social goods[24].

II. FROM COMMONS TO THE PROPERTY OF THE POOR. URBAN CONFLICTS AND THE BUNDLE OF RIGHTS

In an article that I consider seminal for the questions it raises in framing the commons as a matter of property law, Nicholas Blomley tackles the issue of 'the property of the poor',[25] in this wording exemplifying the case in which poor people in a neighborhood of Vancouver in reaction to a proposal from a private developer to build a huge condominium on a site where there was a Woodward's store closed for years, claimed that Woodward's belonged to them as land that had been in the community for decades.

[22] Brett Frischmann, *Infrastructure: The Social Value of Shared Resources*, Oxford University Press, 2012.

[23] A fair example of an idea of infrastructures as commons is offered by basic research. Like a road system or communication networks or oceans, basic research facilitates downstream creation of further knowledge and research. It is a non rival resource, it creates downstream benefites and is characterized by a wide variation in downstream uses. But it is doomed to impoverishment through patenting and enclosures of various kinds – such as objectives selection in accordance to the market demand.

[24] Frischmann, 112.

[25] Nicholas Blomley, *Enclosure, Common Right and the Property of the Poor*, in 17 Social & Legal Studies, 2008, 311; Id., *The Right Not To Be Excluded: Common Property and the Struggle To Stay Put*, forthcoming.

The development was opposed partly because of the fear that it would lead to the gentrification of the neighborhood and so to the displacement of the poor. Partly because the local community was really fond of the store, which they used as a social space and for food shopping.
Social conflicts around urban property are common and even integral to metropolitan areas all over the world. By telling this story the article highlights the way in which urban property shapes social relations among individuals and classes. At the same time it tells us that these conflicts can be phrased in the language of property law as clashes between conflicting *legitimate property interests*.
In fact, if regarded from within the property law rationale, counterposed property claims that arise from social struggles and challenge the legal prerogatives of ownership, lose their supposed initial character of illegality and turn into 'regular' property rights on the premise of reliance interest in property[26], the adverse possession rule and other legal tools the common law provides. Talking from a comparative law perspective, it is possible to list a series of functional equivalents in every legal (property law) system that offer viable response to 'the investment' of the poor on a place in terms of caretaking and stewardship. In other words, several legal tools sustain legitimate property interests of the poor and make it possible to conceive the commons as "a form of place-making".[27] Besides, the caretaking 'investment' of the poor and the property-like claim it fosters encompasses the neighborhood as a whole as it expresses the idea that urban space, and so also land value, is created by the particular ambience shaped by social bonds and activities performed within a certain community and eventually by social cooperation. the caretaking 'investment' of the poor and the property-like claim it fosters encompasses the neighborhood as a whole as it expresses the idea that urban space, and so also land value, is created by the particular ambience shaped by social bonds and activities performed within a certain community and eventually by social cooperation.
Now it seems to me that most part of the possible legal solutions Blomley mentions can gather under the umbrella of the bundle of rights theory. Many legal rules that (may) sustain the property of the poor entail unbundling and sharing the sticks that constitute the bundle. In particular unbundling the bundle of rights means here to subtract to the private owner some of the sticks and to recognize the community or the neighborhood entitled to use that building or that land according to the destination they are used to.

On the other hand also the social function norm has to be read, to my sense, as an application of the bundle of rights scheme. Namely, it can be understood as a *socially oriented* version of the bundle of rights according to which property rights have to be conformed to the general interest, that is to the interest of the whole society. Therefore

[26] See Joseph Singer, *supra* note 19.
[27] Blomley, at 320.

– just like the idea of the bundle of rights suggests - there is not a predefined core of private property that the law cannot submit to limits or conditions in the perspective of the social function accomplishment. In Italian law the most advanced interpretation of the social function provision[28] locates the principle at the core of the legal regime of the commons (common goods in the Italian wording)[29]. According to it property ownership of resources that can be qualified as common goods shall be conformed to the social function principle in order to grant free access, use and management in common of the assets concerned. In other words the owner is not only obligated to permit access and use of the resource she owns to individuals or groups whose fundamental rights benefit from the utilities her property produces. She also has the duty to share the decisions related to use and destination of her asset with the persons concerned.[30]

The question at this point seems to be whether or not the bundle of rights, and more specifically the social function of property, do actually represent the right direction to take to make a way for commons – or for collective rights of access and use - within the property regimes in force. In this part I will try to answer this question by problematizing contents and roles the social function norm has been vested with insofar and others that it may still hold. Tendentially the answer will be a 'yes' with some caution. In fact the social function solution might be unsatisfactory at the margin: on the one hand it might exceed its scope and drown the very notion of property it wish to preserve even if profoundly transformed and thinned. On the other it might turn out to be not powerful enough: not enough to resist the strength of the title when the conflicting property interest, the *property of the poor*, faces not *just* an absent owner, having at its side the force of the community care investment, but the owner's misuse of her property, judged as such by the community. Can the needs and the point of view of the community (the neighborhood, etc.) prevail on the will of the owner as far as the function and use of her property is at stake? What sticks can be disaggregated and shared in this case? More generally, questions like these put in the foreground ideological issues deeply rooted in the structure of property as a social institution and as a legal form. One may wonder, for instance, to what extent the social function norm can affect the right of the owner - commonly assumed as a stick of the bundle - to transform the spillovers coming from social cooperation into rent for her own exclusive benefit. The answer exceeds the purpose of this paper although this and further like questions clearly stay in its background. My goal is actually not to enter into the merits of the relation between property and capitalism but rather to test what the maximum of expansion of legal

[28] S. Rodotà, *Postfazione. Beni comuni: una strategia globale contro lo "human divide",* in Maria Rosaria Marella (ed.), *Oltre il pubblico e il privato. Per un diritto dei beni comuni*, Ombre corte, 2012, 311.

[29] See *infra* note 31.

[30] This standpoint seems to erode the argument made by Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 Toronto L.J. 275 (2008), according to whom if a core of property does exist, it is to be identified not in the right to exclude but in the owner's power to set "the agenda" of the thing, that is in the owner's managerial control over her property.

forms flexibility can be and particularly how farther the social function idea can go in the process of property disintegration.

III. Constructing the Legitimacy of Use as a Collective Entitlement Disconnected from Ownership

Common goods aim to go beyond ownership. Their proper terrain is (collective) use and access.

Emerging commons pose a challenge to the law which is now requested to provide legal tools to resist the dispossession of the commonwealth, i.e. the dispossession of the products of social cooperation. I have argued that the disarticulation of property in the many entitlements that constitute the bundle is a mandatory step in the construction of a possible legal regime of the common goods as taxonomized above.

In this part, however, I do not offer a *theory* of use and access to common goods as an example of the bundle of rights model. Rather I want to map those legal arrangements that have been operationally employed to construct the legitimacy of *use* as a collective entitlement disconnected and opposed to ownership.

In recent experiences the legal instruments that have been deployed in order to protect (or re-appropriate) the commons are of a wide variety, ranging from property-like or counterposed property claims[31], to the denial of private property (such as informality in urban development), by way of creating a legal person out of the common resource to protect[32].

Also in reference to intangible goods and cultural commons we find both a counteregemonic use of intellectual property rights (such as the copyleft strategies)[33], and the denial of intellectual property rights[34].

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[31] Nicholas Blomley, *Enclosure, Common Right and the Property of the Poor,* Social Legal Studies 2008; 17; 311.

[32] As to the Treaty between the Maori community and the Neozealand government see *Ruruku Whakatupua Te Mana o te Awa Tupua*, available on line at URL: http://nz01.terabyte.co.nz/ots/DocumentLibrary/RurukuWhakatupua-TeManaoTeAwaTupua.pdf; as to the occupied Teatro Valle in Rome and the (common good)foundation see Giardini Federica, Mattei Ugo, Spregelburd Rafael, *Teatro Valle occupato. La rivolta culturale dei beni comuni*, DeriveApprodi, 2012.

[33] Emblematic are also patents registered by indigenous people, such as Maori on features of their traditional culture. See Simone Vezzani, *I saperi tradizionali e le culture popolari nel prisma dei beni communi*, in Maria Rosaria Marella (ed.), *Oltre il pubblico e il privato. Per un diritto dei beni comuni*, Ombre corte, 2012. S. Vezzani, *Il Primo Protocollo alla Convenzione europea dei diritti umani e la tutela della proprietà intellettuale di popoli indigeni e comunità locali*., in Diritti umani e diritto internazionale, 2007 fasc. 2, pp. 305 – 342.

From a comparative law perspective we can conclude that multiple legal tools are available that serve as functional equivalents. We can taxonomize them according to the following criteria: the legal or informal nature of the arrangement; the preference for private law or public law settings and the reference to one or the other entity of the subject/object dichotomy.

III.1. Use Through Or Beyond The Law

a) Titling. The creation of formal property rights is the strategy commonly devised to counter land grabbing policies in Sub-Saharan countries, where indigenous people and other communities often have mere informal collective rights of use. The titling campaigns pursue the formal recognition of collective rights on land, what would deter foreign investors from buying or leasing those lands.

b) Non-titling. On the contrary urban residential commons which result from untitled occupations, such as squats, can be better protected against dispossession through a strategy of informality. Practices of informality in urban development are diffuse in Latin America and the Global South. Drawing upon the economist De Soto's account, the World Bank has launched a titling campaign based on the assumption that the allocation of property rights to squatters will make them better off[35]. The resistance to the World Bank's policy relies on the conflicting idea that titling would push the squats (lands and buildings) back to the real estate market and to the credit/mortgage circuit with the result to deprive the new owners of their houses in the long run.

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[34] An important case concerning patents on human genes is *Association for Molecular Pathology v. United States Patent and Trademark Office*. In May 2009 Association for Molecular Pathology and other medical associations, doctors and patients sued the United States Patent and Trademark Office (USPTO) and Myriad Genetics, to challenge patents related to two breast cancer genes, BRCA1 and BRCA2, and some methods concerning diagnostic screening. According to the plaintiff those patents violated §101 of the Patent Act, 35 U.S.C. The United Stated District Court for the Southern District of New York declared that isolate DNA is not patentable because it is not "markedly different" from native DNA as it exists in nature, and that the claims for "analyzing" and "comparing" DNA sequences are invalid because concerning mere abstract mental processes. Myriad and the University of Utah Research Foundation appealed to the Court of Appeals for the Federal Circuit. On July 29, 2011, the Federal Circuit held that isolated DNA sequences cannot be considered product of nature because chemically distinct from their native state; moreover the screening method for cancer therapeutics includes transformative steps and present "functional and palpable applications in the field of biotechnology". Instead the Court confirmed that claims for comparing and analyzing DNA sequences are patent-ineligible. In March 2012 the U.S. Supreme Court issued a first writ of certiorari. It vacated the Federal Circuit judgement and remanded the case back to the Federal Circuit to reconsider it in light of the recent decision in *Mayo Collective Services v. Prometheus Laboratories*. The Federal Circuit confirmed its previous position about the patentability of isolated human genes. Association for Molecular Pathology petitioned for another writ of certiorari, which was granted, but limited to the question if human genes are patentable. On June 13, 2013 the U.S. Supreme Court stated that a DNA segment is a product of nature and so it is not patent eligible, even if it has been isolated; instead, cDNA may be patent eligible because it is not naturally occurring.

[35] See the case study presented by Jorge Esquirol in *Titling and Untitled Housing in Panama City,* 4 Tennessee Journal of Law & Policy (2014)

III.2. Use Between Public Law And Private Law

a) Full Private Law Arrangements. The need for affordable housing in western metropolis has found interesting solutions in private law arrangements that combine individual and collective entitlements. The Unitedstatesean experience of the Limited Equity Cooperatives (hereinafter LEC) is one of them and in my view the closest to an idea of urban space as commons. LEC are designed as vehicles for low income housing. They implement a multilateral legal mechanism based on unbundling the bundle of rights: a land trust or other nonprofit entity owns the land, a cooperative owns the building, the residents own shares of the cooperative, equity appreciation on the cooperative shares goes to the land trust and the coop and not to the residents, thus housing units keep on being affordable even when first residents sell their shares.

From the perspective of urban commoning improvement the LEC experience is significant for at least two reasons: firstly because it creates collective actors that are able not only to stop gentrification but also to trigger a social transformation in the neighborhood; secondly because housing is not provided on the basis of house tenure but by means of the cooperative shares: thus no real property is constituted upon the residents, what is strategically a good move in the perspective of a transformative project. As we have already observed above (S. II.1 sub *b*) property allocation is barely functional to social transformation.

In Italy an analogous experiment aims to provide access to affordable housing beyond both state housing programs and the housing market. It draws on the law of obligations in order to disaggregate access to housing from ownership and to create a collective management of the units which is neither public nor based on individual property rights. I am referring to the so called EVA project, located in Pescomaggiore, a small village near L'Aquila, the gorgeous renaissance city destroyed by an earthquake in 2009 and never reconstructed. EVA represents an original legal arrangement designed to resist the CASE project, a development project developed by the Berlusconi government to provide homes to people after the earthquake in L'Aquila. As an effect of the Berlusconi project the citizens who had their homes damaged by the earthquake have been dispossessed of both their private homes and their public space. Following the earthquake they had been confined and forced to live far from downtown, sprawling throughout a vast territory with no urban structure or social relations. The EVA project intended to avoid all this. The practice of commoning here aims at providing temporary houses to people in troubles because of the earthquake by superseding home-ownership and the market at the same time. Land is voluntarily provided by land owners on the basis of a gratuitous loan for use (*contratto di comodato* in Italian law). Simultaneously a

committee collects funds for the construction of environmental friendly houses, by promising to the public that whatever gift will be made, it entitles the donor to be part of a collective body, called the Tavola Pescolana, which is in charge of the management of the eco-village. Gifts do not give access to ownership but to the mere use of the units. The same units cannot be sold in the market. After residents will have their former houses fixed and habitable again, they will keep on managing the eco-village in common with a new, touristic destination.

b) Across Public and Private Law. In March 2012 in Naples a multitude of artists and knowledge-workers occupied a gorgeous 16th century building located in the downtown (Ex Asilo Filangieri) to protest against its renovation and subsequent abandonment by the local government. After few months of *virtuous occupation* (see below), in May 2012 the municipality assigned the building not to the single natural persons occupying the building at that moment but to an undifferentiated crowd of knowledge-workers, i.e. to an open community. The use that the municipality's resolution allows is legally grounded on two elements: the practice of commoning as a management regime to be established on the building and shared by an open community for the benefit of all, since then and for the future, and a regulatory draft of the building's use terms that the community shall define and the local authority agree upon. The legal form that both the community of artists and knowledge workers and the local government evoke in the definition of the legal regime of use and access to the Asilo Filangieri building is an old customary law figure of use known as *usi civici* and diffused in the Italian countryside and sometimes, although seldom, in Italian cities (*usi civici urbani*). A regime of *uso civico* grants access to and use of land to local communities usually, but not exclusively, for grazing and timber. The recall of the old experience of *usi civici* is double-sided: on the one hand it reminisces old collective property rights which epitomize an alternative to the individual private property model of modern law; on the other the *usi civici* model is assumed as a possible legal scheme by which to formalize stable experience of self-government, democratic participation and commoning.

To sum up, the sources of the legal arrangement employed for the management of the Asilo Filangieri building are the local authority resolution, private autonomy which finds its expression in the regulatory drafting and a possible (prospective) customary law.

c) Full Public Law Solutions. Recently several Italian municipalities have implemented specific protocols dedicated to the regulation of citizens' good practices of participation and care of the urban commons.

The first city that adopted such an instrument is the city of Bologna with the *Bologna Regulation on Collaboration for the Care and Regeneration of the Urban Commons* enacted in 2014. Other commons-based experiments in cities around Italy have followed. Their legal basis is to identify in the principle of horizontal subsidiarity provided by Art. 118 of the Italian constitution, according to which the State and local governments at different levels shall foster citizens' autonomous initiatives aiming at promoting the general interest of the collectivity. The other pillar in this setting is the *active citizenship* philosophy, according to which citizens as such have not only rights towards the State but also responsibilities to society. Therefore citizens are expected to share with the state or local government the commons' stewardship. Within this framework urban commons – usually publicly owned goods - are identified and taken care of on the basis of distinct protocols negotiated between citizens – as individuals as well as associations – and the municipality which owns them or is in charge of their custody.

A French way to a full public law regulation of the commons can be recognized in a recent interpretation of Art. 714 of the Code Civil, which states that common things are those things that do not belong to anyone and therefore can be used in common. This provision, traditionally restricted to the air and the seawater and substantially neglected because opposed to the dominant model of individual private property as absolute and inviolable - still interpreted as the true core of the system designed by the Code civil - is now re-read as the legal foundation of the *public domain*. Accordingly access to and use of resources like information on the internet, are reconstructed in terms of a liberty, liberté publique in French law, such as freedom of speech, for instance[36].

This is a valuable solution in the perspective of opening up the access of (mainly intangible) common resources to all, although likely to interest only non rival goods and non-community based commons[37].

III.3. Use Across The Subject/Object Distinction

In the epistemological framework of the subject/object dichotomy the common goods are usually located within the latter end as objects. An alternative solution for commons may be to turn 'the object' into a legal person, i.e. into 'the subject of law'. This is the legal status that has been recently recognized to a river, the Whanganui River in New Zealand by virtue of an agreement between the national government and a Maori population. Drawing on the autochthonic tradition that identifies the river with the

[36] S. inter alia Gaudemet, *Libertés publiques et domain public*, in *Mélanges en l'honneur de J. Robert*, Montchrestien, 1998, 134 ; Chardeaux, *Les choses communes*, L.G.D.J., 2006, 179.

[37] Problems arise when we think to occupations that may be protected by means of possession claims: a potential conflict between free access granted to all and the legal protection of possession is clearly arises here.

population itself, the *Whanganui Iwi* (*I am the River and the River is me*), the agreement recognizes the river as *Te Awa Tupua*, an autonomous legal entity. In legal terms the stewardship responsibilities are grounded on the powers of the river legal representative(s).

Not too far from this 'exotic' arrangement is the project of making a private foundation out of the Teatro Valle Occupato. The Valle Theater is a national theater located in Rome and one of the oldest and most prestigious theaters in Italy. It was occupied in June 2011 by a group of artists to resist its possible privatization and 'turned' into a cultural commons. The Teatro Valle Occupato became soon a symbol of the common goods movement in Italy and a site of commoning experimentation in art's and culture's production. The project of the Teatro Valle Occupato Foundation (*Fondazione Teatro Valle Bene comune*) has been supported by the monetary contributions of a large number of people (activists, artists, spectators, etc.) and has got at its core the continuous production of intangible goods: the patrimony of artistic productions, lectures, seminars, training courses that have taken place in the theater for three years. This patrimony will keep on fostering the foundation project although the theater has been recently released by the former occupants.

In fact this circularity between the two polarities of the subject/object distinction has been distinctive of older experiences of commoning, such as the collective ownerships of lands located in some regions in Italy, like the so called *Partecipanze Agrarie* in Emilia, which were formerly regulated by customary law and the national legislation has later turned into legal persons.

IV. (NOT A) CONCLUSION. ON THE COMMONS AND THE BUNDLE OF RIGHTS

Most of the legal arrangements I have mapped in part III pair with narratives of social conflicts and resistance to what David Harvey has brilliantly defined accumulation by dispossession. By creating and/or protecting the commons the settings we have explored also aim to stop gentrification, enhance equality, and take care for future generations.

In the Italian scenario the social struggles against dispossession that pursue the design of new forms of commonwealth mostly take advantage of the legal tools offered by private law, namely by freedom of contract and the law of property, conceived as a bundle of rights.

To conclude I want to go back to a critical reading of the law of property and address some questions related to the idea of property as a bundle of rights, namely to the

question raised at the outset: To what extent the disarticulation of property in the many entitlements that constitute the bundle may be functional to the construction of a legal regime for the common goods? In doing so I will refer once again to the way in which all this materialized in the experience of the common goods in Italy taking advantage of the non-naturalistic approach I have illustrated above.

Unbundling the Bundle of Rights 1.0

This is the case for briefly recalling an important tradition of scholarship which has largely contributed to deconstruct the dominant view of property as an absolute right[38]. To begin with one may remind the old case of Villa Borghese, a wondrous park in the centre of Rome. Although the park was privately owned by Borghese family, it was a custom of people living in Rome to go across the park and hang out inside it. At some point the owner decided to enclose the Villa precluding the access to the public. The mayor of Rome as representative of the citizens sued Marcantonio Borghese, the owner, arguing that Villa Borghese was a *res in usu publico*, that is a private property burdened by the right of entry of the public. Therefore it could not be enclosed so as to exclude Roman citizens. The Court upheld the mayor's argument and the park was opened again to people's access and use[39]. The doctrine enforced here is to some extent similar to the *public trust doctrine* commonly enforced in some common law jurisdictions[40]. The idea is that a privately owned good can under certain circumstances have the same function as a publicly owned good and namely as a good in the public domain (*bene demaniale* in Italian law), such as a public road. Consequently the law has to grant public access to those privately owned lands or assets – parks but also libraries or galleries – that are functional to the fulfillment of material, (and also) artistic or cultural interests of the collectivity. In Italian law this outcome was achieved by drawing on the law of servitudes. As a result of that old case law the new Italian civil code enacted in 1942 includes a provision devoted to the discipline of the servitudes of public use (Art. 825 c.c.): it also provides a collective access to justice, i.e. a kind of collective or 'popular' action on the basis of which every citizen is entitled to sue the owner when she precludes the public entry. One may conclude that the servitude of public use is a means to allocate some sticks of the bundle to the collectivity preserving the tenure of the original owner on the one

[38] See the seminal study of Salvatore Pugliatti, *La proprietà e le proprietà*, in Id., *La proprietà nel nuovo diritto*, 1954, 159.

[39] Cass. Roma, 9 marzo 1887. The Municipality's success was also due to the legal arguments of the plaintiff's attorney, Pasquale Stanislao Mancini, a distinguished legal scholar whose appeal brief was later published with the title *Del diritto di uso pubblico del Comune e del Popolo di Roma sulla Villa Borghese*, in "Il Filangieri", XI, 1886.
On this case law see Andrea Di Porto, *Res in usu publico,* Torino, 2012, pp.45-73.

[40] S. Gregory Alexander, *The Social-Obligation Norm in American Property Law*, 94 Cornell law review 745, 801 ff. (2009).

hand and turning the real estate (the park in the Villa Borghese case) into a common good on the other.

In late XIX century agrarian reforms projects aimed at revisiting the old collective properties existing in Italy purifying them from traditional element of closure and conservatorism, like membership limited to male descendants of the original members, in the perspective of granting access to land to rural poor and enhancing social equality[41]. Affordable housing was another field of property sticks disaggregation and reassemblage. The Luzzati Law of 1903[42] created two different types of units, *case economiche* and *case popolari*, both developed by public law institutions (regional 'institutes for affordable housing') "but largely funded by private banks and mutual aid cooperatives".[43] While *case popolari* were publicly owned units to be leased at a fixed rate, *case economiche* were to be sold at a fixed price to lower-middle-class buyers but owners' use and alienation rights were subject to restraints under the *Institutes* control. The resulting affordable housing scheme was an interesting experiment of property rights disaggregation and redistribution between public and private actors.

Unbundling the Bundle of Rights 2.0

The issue of the 'new' occupations deserves some additional attention. I am referring here not to the usual squats, but to places of '*commoning*' where occupants reinvent social welfare by opening up buildings of public or private ownership – especially theatres, movie houses, but also factories and farms released by their owners – to a larger community (the neighbourhood, the town, etc.). In doing so, they transform these assets into facilities and services to be shared and managed in common.
These occupations activate a virtuous circle of utilities production by 'freeing' real estates and areas from owners' misuse at the same time using them 'properly'; for instance, by organizing Italian language courses for migrants, free sport activities, cultural happenings, after-school activities, free access libraries, etc. By guaranteeing free access to urban sites, occupants not only put in place a bottom up production of welfare, but also try to reinvent labour out of the labour/capital relation. This allows for alternative ways of income through '*commoning*'. Now, the attempt to save these occupations from eviction is strictly connected to (and affected from) the legal construction of common goods and commoning. This would permit to re-connect what is legal to what is (illegal but perceived as) legitimate and fair.

[41] See Anna di Robilant, *Common Ownership and Equality of Autonomy*, 58 McGill Law Journal (2012), 263, 288.
[42] Ead., *Property: A Bundle of Sticks o r a Tree?,* 66 Vanderbilt Law Review (2013) 869, 916.
[43] Ead., at 917.

The case of the occupation of the Colorificio Toscano in Pisa epitomizes the difference that alternative visions of property can make in tackling conflicts on alternative uses (and misuses) of urban assets. The Colorificio case represents a great experience of commoning that the commons' legal discourse has unfortunately not been able to preserve from the antagonistic view of property as an absolute right. The case is about the occupation of a dye factory released by the owner, who had first purchased the factory, being mostly interested to the related intellectual property package, and then had delocalized the material production of dyes, dismissed the industrial activity in Pisa and fired the local workers. In fact the goal of the owner was at that point to obtain the revision of the urban zoning plan by the municipality in the perspective of a residential development from which gaining profit from the area. With the activists' occupation this huge area was restored and returned to citizens. It soon became the site of bottom-up welfare production, with popular training courses, handcraft labs, after school activities for children and even a climbing wall accessible to all. However the owner sued the occupants and obtained the restitution of his property.
This unfortunate epilogue laid some questions on the table, one above all: Is the dye factory owner entitled to sue the occupants after having exploited and abandoned his property? Or is this an abuse of right?

In this paper it has been argued that by unbundling the bundle of rights, rights of use and of access can be disarticulated from ownership as sticks that can be allocated to other people, social groups and communities. In Italian law a *socially oriented* version of the bundle of rights theory can be identified in the principle of the social function of property which is sanctioned by the democratic Constitution at Art. 42, 2. Accordingly property rights have to be conformed to the general interest, that is to the interest of the whole society. Therefore – just like the idea of the bundle of rights suggests - there is not a predefined core of private property that the law cannot submit to limits or conditions in the perspective of the social function accomplishment. According to a certain interpretation of the same provision[44], the exercise of property rights by the owner has to conform to the general interest, so as to realize their social function.

In the light of the social function principle we may rephrase the question as the following: Is the dye factory owner's behavior *lawful* according to the principle of social function? Did he deserve - in the light of the Italian Constitution - the legal protection he got from the trial court? In other words can the social function be deployed in order to save 'virtuous occupations' from eviction and protect the common goods?

[44] S. Rodotà, *Note critiche in tema di proprietà*, "Rivista trimestrale di diritto e procedura civile", 1960, 1252.

The most advanced interpretation of the social function provision[45] goes in this direction locating the principle at the core of the legal regime of common goods. According to it the property of resources that can be qualified as common goods shall be conformed to the social function principle in order to grant free access, use and management in common of the assets concerned. In other words the owner is not only obligated to permit access and use of the resource she owned to individuals or groups whose fundamental rights benefit from the utilities her property produces. She also has the duty to share her power of control over the thing, that is the decision-making *stick* of the bundle concerning use and management of her asset, with the people involved because affected in their fundamental rights.

This outcome can be framed within a strongly redistributive interpretation of the social function principle, as far as the latter entails the premise that there is not such a thing like a core of property that the law has to preserve. Therefore property ownership will be re-read in the light of common goods protection and owners' prerogatives unbundled in consideration of the safeguard of non-owners' fundamental rights. In this sense the social function norm operates both as a behavioral standard on the basis of which it is possible to assess the legitimacy of owner's activities and as a parameter of the variable substance, contours and content of property. What is totally in accordance with the fact that common goods emerge from dynamic patterns and are not qualified as such always and forever.

This is just a partial and tentative conclusion: the commons issue shakes up lawyers' most consolidated thinking patterns and requires jurists to be more imaginative than ever. Great efforts are still to be made. The contribution of comparative law is crucial in this respect. And from this point of view the Italian story I have been telling in this paper is not just relevant within the national borders. Functional equivalents for the legal arrangements I have been describing so far can be found in every legal system. And more importantly in every legal system the concrete regulation of property rights is the result of a variously fashioned compromise between private interests and public constraints, personal liberty and redistributive motives, the individual and the community.

[45] S. Rodotà, *Postfazione. Beni comuni: una strategia globale contro lo "human divide",* in Maria Rosaria Marella (ed.), *Oltre il pubblico e il privato. Per un diritto dei beni comuni*, Ombre corte, 2012, 311.